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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 208.

LEWIS E. SMOOT, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

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Statement.

This is an appeal from a judgment of the Court of Claims rendered June 2, 1913, dismissing appellant's petition (Rec., p. 66), which appeal was duly allowed June 16, 1913 (Rec., p. 66), in a proceeding in which the claimant prayed judgment against the United States in the sum of $42,459.91 (Rec., p. 54).

The claim, as set forth in the original (Rec., pp. 1-3) and amended petitions (Rec., pp. 53-4), is that by virtue of a certain contract with the United States for supplying filter sand for the Washington Filtration plant, for the city of Washington, D. C., of April 4, 1903, the petitioner was authorized and required to supply and deliver in place, 140,200 cubic yards, *more or less*, of filter sand (Rec., pp. 47-51), and that by a subsequent contract, dated February 17, 1905 (Rec., pp. 51-3), while the work was in progress, the estimated quantity of 140,200 cubic

yards, more or less, was definitely and unconditionally increased to the fixed and determinate aggregate quantity of 179,231 cubic yards, to be supplied between February 17, 1905, and October of the same year. That, in order to supply, within the time stated, the additional quantity of 39,031 cubic yards of sand, it became necessary for claimant to build an additional washing and screening plant at a cost of over $12,000. That subsequently, and without lawful right, the officers of the United States reduced the fixed and definite amount so contracted for, from 179,231 cubic yards to 157,725 cubic yards, and, though petitioner was ready and willing to supply, and tendered the supply of the balance of 21,506 cubic yards of sand, the United States would not receive the same nor permit the delivery thereof, by reason whereof the petitioner lost the profits he would have realized from supplying said balance of 21,506 cubic yards of sand and also lost the net cost to him of the said additional washing and screening plant.

In its findings of fact the court found that the net cost of the new washing and screening plant amounted to $9,888.04 which became a total loss to claimant (Finding X, Rec., p. 61), and that the net profit which claimant would have realized had he been permitted to deliver all the sand, after deducting the cost of the new washing and screening plant, would have been $28,065.33; or, excluding the cost of that plant, would have been $29,420.20 (Finding XII, Rec., p. 62).

The record presents but two questions; namely, first, whether, under the proper construction of the contracts a valid agreement, binding upon the United States, was made for the delivery of the whole quantity of 179,231 cubic yards of sand, or only so much thereof as the United States chose to accept, and, second, whether the claimant was entitled to recover, as a proper part of the measure of damages, his loss of $9,888.04, the net cost of

the new washing and screening plant erected by him to do the work.

The facts, established by the findings and considered by counsel for claimant as material to these questions, are substantially as follows:

The United States having undertaken to provide a filtration plant to filter the water supply of the city of Washington by a system of slow sand filtration, published a certain advertisement seeking proposals for the work (Rec., p. 4). This advertisement, and the specifications following (Rec., pp. 4-47), were attached to and made part of a contract with the claimant (Rec., pp. 47-51) as established by the first and fourth findings (Rec., pp. 55, 56). An inspection of these specifications indicates a large amount and variety of work and materials, but only one is involved in this suit; namely, the supplying in place, in the filter beds, of *filter sand.*

Prior to making the contract, the United States had employed Mr. Allen Hazen as a consulting engineer to prepare these specifications and to advise the officers in charge of the work, from time to time, in its progress. There were two advertisements for bids for the construction and equipment of the plant, and in the specifications prepared by Mr. Hazen for the first advertisement the aggregate quantity of sand to be put in the twenty-nine beds was stated to be 140,200 cubic yards, more or less, *after settlement with water upon it for one week.* All bids received on this advertisement were rejected, however. In the second advertisement, under which this contract was made, the same specifications were used, requiring 140,200 cubic yards, more or less, with this single modification, that the words "after settlement one week with water and with the filter in operation" were stricken out. This was done without the knowledge of Mr. Hazen. The physical effect of this change was to reduce the quantity of sand required by Hazen's original

specifications to the extent of the compacting or shrinkage that would ensue from the settlement with water (Finding IV, Rec., p. 56).

The sand was to be placed in twenty-nine beds and the United States agreed to cause all necessary work to be done to construct the beds in condition to receive the sand (Finding II, Rec., p. 56).

It was under these conditions that the contract with the claimant (Rec., pp. 47-51) was entered into, on April 4, 1903, by which the claimant was to supply "one hundred and forty thousand, two hundred (140,200) cubic yards, more or less, of filter sand" (Rec., p. 48).

By paragraph 20, of the specifications (Rec., p. 6) it is provided, "that the quantities given are approximate only;" by paragraph 299 (Rec., p. 42) it is stipulated that "the quantities assumed, and upon which bids will be canvassed, are as shown in form of proposals. See, also, Par. 20," while the form of proposal is (Rec., p. 42) "all quantities specified being 'more or less.'"

On July 15, 1904, claimant was notified by the officer in charge, that he would be ready to receive filter sand by August 1, 1904, and to begin deliveries by that date, with which direction claimant complied (Finding III, Rec., p. 56).

In October, 1904, a discussion took place between the consulting engineer, Mr. Hazen, and Mr. Hardy, an engineer also in the employ of the United States, in the presence of claimant, concerning the change in the specifications as originally prepared by Mr. Hazen, and the necessity for an increase in the quantity of sand to be furnished, over and above that specified in the contract, sufficient to cover the amount of shrinkage which would ensue from settlement.

At that time Mr. Hazen suggested one inch per foot, and one inch additional, for each bed, as an approximation of the increase necessary, and a computation was then made on that basis, but no definite decision was

then reached as to the quantity. Captain Wooten, then the engineer officer in charge of the work, was informed in the presence of claimant of this conversation between Hazen and Hardy concerning the probable necessity for an increase in the quantity of sand (Finding V, Rec., pp. 56-7).

Subsequently, Lieut.-Col. Smith S. Leach became the engineer officer in charge, and some time prior to January, 1905, Mr. Hazen not having made any more definite statements of the amount of sand to be required, Hardy made computations upon the basis of Hazen's recommendation and he and Lieutenant-Colonel Leach, the engineer officer in charge, estimated the approximate aggregate quantity of sand to be required.

Thereafter, on January 3, 1905, only fifteen of the twenty-nine beds being then completed and ready to receive sand, Lieutenant-Colonel Leach wrote claimant directing him to complete the deliveries of sand in these fifteen beds by May 15th, by placing in them 70,000 cubic yards of sand in addition to that already in place in those beds, making the total for those fifteen beds of 90,936 cubic yards (Finding VII, Rec., p. 57).

No further directions were received by the claimant until February 17, 1905, at which date claimant had delivered in place, 28,231 cubic yards of sand (Finding VIII, Rec., p. 58). On that date Lieutenant-Colonel Leach, the engineer officer in charge, wrote to claimant an order specifying the quantity of sand claimant must deliver in addition to that already in place during that month and each succeeding month, up to and including the month of October, and the beds into which it was to be deposited (Finding VIII, Rec., pp. 58-60).

As fixed by the eighth finding,

> "The amount of sand specified by this letter was 151,000 cubic yards in addition to that already in place, which would have made a total of 179,231 cubic yards" (Rec., p. 60).

This order was the first and only communication to the claimant which reduced, or attempted to reduce, to definiteness, the aggregate quantity of sand to be supplied by the claimant, there being, theretofore, nothing but the indefinite "more or less" terms of the contract and specifications and the inconclusive discussion with Hazen, Hardy, and Captain Wooten as to the additional amount, over and above 140,200 cubic yards, more or less, to be required by reason of the change in the original specifications heretofore mentioned.

This order, after stating that the depth of sand in different beds may vary, some having over 6,000 cubic yards, and others having less, but that 6,000 cubic yards is about the average, adds:

> "In any case the *yardage* is the item to which *especial attention must be paid*, and this should in *all cases* be equal to that indicated in the program" (Rec., p. 59).

It further states that:

> "You are required to take notice that the *quantities* of work . . . will be *rigorously exacted as a minimum, and any failure* on your part to perform in any month the *quantity* of work stipulated for that month will be considered by me as *sufficient cause* for the exercise of the right reserved to the United States in paragraph 37 of the specifications to the contract to purchase needed materials in the open market; of the discretion given me in paragraph 39 of the specifications to suspend monthly estimates and payments; and the right conferred upon me in paragraph 41 of the specifications, after five days' notice, to annul the contract and take possession of your plant, and so forth, at a rental valuation to be determined by myself" (Rec., p. 59).

Seven days later, on February 24, 1905, the claimant commenced the construction, at Laurel, Md., of an addi-

tional washing and screening plant which was completed May 30, 1905 (Finding IX, Rec., p. 60). In the meantime, and on April 18, 1905, without the knowledge of claimant, Mr. Hazen made a report to Lieutenant-Colonel Leach, fixing the aggregate amount of sand he deemed proper to be supplied at about 157,000 cubic yards (Finding XI, Rec., p. 61).

This report was adopted by Lieutenant-Colonel Leach and his subordinates were instructed to carry out its terms, but the claimant was not notified of this change until May 29, 1905, one day before the new plant at Laurel was completed, when he was orally informed by Lieutenant-Colonel Leach (Finding XI, p. 61).

Claimant immediately protested to the engineer officer in charge against this reduction in quantity and insisted upon his right to supply the whole quantity ordered in the letter of February 17, 1905. This protest was disregarded, by the engineer officer in charge, and claimant was only permitted to supply 157,725 cubic yards. The claimant had an abundant supply of sand of the kind required and ample facilities for delivering in place within the time prescribed by the order of February 17, 1905, the entire quantity required by said order (Finding XI, Rec., p. 61).

The actual and reasonable cost, to the claimant, of the new washing and screening plant was $12,501.71 and, after deducting the value of all materials sold or on hand and fit for use, the net cost amounted to $9,888.04, which became a loss to claimant (Finding X, Rec., p. 61), and this new plant was never used, either for furnishing the sand specified in the contract or for any part of that which was in fact furnished (Finding IX, Rec., p. 60).

If the claimant had been permitted to furnish the additional 21,506 cubic yards of sand, under the contract, his profit, after deducting the cost of the new plant, would have been $28,065.33; excluding that cost,

it would have been $29,420.20 (Finding XII, Rec., p. 62).

The court below by its judgment, dismissed the petition (Rec., p. 62) holding, in its opinion, that the legal effect of the order of February 17, 1905—

> "was to signify a purpose on the part of the Government that the additional quantity of sand *might* be needed, but that the purpose was *liable to be changed at any time*" (Rec., p. 65).

It also held, in its opinion, that the claimant was not entitled to recover for the cost of the new plant, because that new plant was not "built solely for the purpose of taking care of the deliveries of the additional quantity of sand set out in the letter" (Rec., p. 63).

Assignment of Errors.

1. The court erred in dismissing the claimant's petition.

2. The court erred in not rendering judgment for the claimant for the profits he would have realized on furnishing the 21,506 cubic yards of sand ordered by the order of February 17, 1905, which claimant was thereafter not permitted to furnish.

3. The court erred in not rendering judgment for the claimant for the cost of the new washing and screening plant.

4. The court erred in holding that the order of February 17, 1905, was not an absolute and unconditional order to deliver and a valid contract binding on the defendant to receive and pay for the whole 151,000 cubic yards of sand specified in said order.

5. The court erred in commingling with its finding of fact (the ninth) an erroneous conclusion of law that the new washing and screening plant was not built in consequence of the order of February 17, 1905, in order to supply the additional quantity of sand required by that order.

ARGUMENT.

The solution of the questions presented by this record depends upon the proper construction of the terms of the order of February 17, 1905 (Rec., pp. 58-60), and upon the authority of Colonel Leach to make that order.

For the purposes of this case, and to obviate needless discussion, it is conceded, that, by the terms of the original contract (Rec., pp. 47-51), and the accompanying specifications (Rec., pp. 4-47) the *quantity* of sand to be supplied and which the United States agreed to accept was wholly indefinite—140,200 cubic yards, more or less—and that the United States was at liberty to order any quantity either more or less than the named quantity.

It is also conceded that the United States was not bound to determine this question of quantity at any particular time.

On the other hand the contract did not concern any emergency or a continuous and fluctuating enterprise. The sand was not, like the river whose water it was to filter, to flow on perpetually. This sand was a part of a physical structure, of fixed dimensions, and in the nature of things the *quantity* of sand required was, at some time and by some one, to be reduced to a definite and fixed certainty, just as would be the number of bricks in a wall of known dimensions.

When, therefore, an agent of the United States, thereunto lawfully authorized, did reduce that indefiniteness to certainty by fixing in precise and unqualified terms the exact quantity to be supplied, and required the claimant to supply it under the pain of forfeiture for default, then the indefinite or "more or less" feature of the contract disappeared, as though it had never existed, and the contract became unconditional and absolute in its terms for the delivery of a definite, fixed quan-

tity, and the claimant could not thereafter be *required* to furnish *more* nor *less* than the amount so definitely fixed.

I.

The Order of February 17, 1905, is an Absolute and Unconditional Order to Supply 151,000 Cubic Yards of Sand Between That Date and October.

The court below find, as a fact, that the amount of sand specified by this order was 151,000 cubic yards in addition to that already in place, the terms of the finding being:

> "The amount of sand specified by this letter was 151,000 cubic yards in addition to that already in place, which would have made a total of 179,231 cubic yards" (Finding VIII, Rec., p. 60).

Notwithstanding this finding of fact, the court, in its opinion, holds that the order did not constitute a positive order to supply that quantity, saying (Rec., p. 64):

> "The letter appears to be merely a designation of quantity. It sets out the amount of sand which the engineer officer in charge *thought might be necessary* under the contract for the completion of the work."

And further, the court says (Rec., p. 65):

> "In the present case, we think the effect of the letter was to signify a *purpose* on the part of the Government that the additional quantity of sand *might be needed*. but that the *purpose* was *liable to be changed at any time.*"

From the first passage in the opinion above quoted, it would seem that the court means to treat the order as a mere *estimate* of what *might* be required. In the second passage, which, it is respectfully submitted, is

rendered somewhat ambiguous by the use of the word "purpose," in the connection in which it is employed, it appears that the court means to characterize it as an expression of a present *intention* as to the *quantity* of sand to be furnished, but subject to change at any time.

It is respectfully submitted that in thus construing the order the court manifestly erred and that upon any possible interpretation of the order it was a positive direction to furnish, between the 17th of February, 1905, and the month of October, the 151,000 cubic yards of sand under the penalty, in the event of any default, of the stringent provisions of the specifications.

Upon the receipt of this order the claimant was not left to speculate as to what would be required of him, but was definitely informed in positive terms, which left no room for conjecture. The order embraces time, place, and quantity, and, while it contains some specific reservations of the right of the United States to vary the order with respect to the *one matter* of *place*, it is fixed and positive as to *time* and *quantity*, and it nowhere contains a suggestion of any right to vary either of these. With respect to time the order says (Rec., p. 58):

> "I have laid down a program of work to be done during *each of the months* from now on, of which program the portion relating to your particular contract is as follows."

Then follows a schedule for *each month by name*, from February to October, and nowhere in the entire order is there any suggestion that a longer time may be allowed or a shorter time be required.

With reference to *place* the order is less rigid and reserves the right to some deviation from its explicit terms. Thus, the schedule (Rec., pp. 58-9) specifically designates, *by their numbers*, the beds to be filled, and the order in which they are to be filled in the designated

months, but the possibility of change in this matter of *locality* is plainly stated in these words (Rec., p. 59):

> "The *order* in which the beds are to be filled *may*, with the consent, or by the direction of the engineer officer in charge, be *varied*, as may later be found *necessary or desirable*.
>
> "Where particular localities are named for work, as, for example, *in beds of specified numbers*, the right is reserved to require an equal quantity of work during the same month *in a different locality*, but this right will be exercised with great reserve, and only when it is manifest to the engineer officer that no hardship will result to the contractor from the change."

In dealing with *quantity*, however, which is the *sole question presented by this record*, no qualification whatever is made and the order does not admit of a variation by so much as a spadeful. Not only are the quantities to be delivered in each month specifically stated in the schedule, specifying the number of cubic yards, for each month, but the order, in emphatic language, announces the absolute obligation to deliver those quantities without any variation whatever.

In the first paragraph following the schedule (Rec., p. 59) after pointing out that some beds will require more than 6,000 cubic yards and others less than 6,000 cubic yards, but that 6,000 cubic yards per bed will be the average, it is stated (Rec., p. 59):

> "In any case, the *yardage* is the item to which *especial attention must be paid*, and this should, in *all* cases be *equal* to that *indicated* in the program."

So, in the second following paragraph, providing for a possible change of *locality*, the order states that, in the event of a change being made in locality, from that designated in the program—

> "the right is reserved to require an *equal quantity* of work during the same month in a different locality" (Rec., p. 59).

Then follows this paragraph (Rec., p. 59):

> "You are required to take notice that the *quantities* of work, and, unless otherwise ordered, the locations of the same above scheduled for the several months, *will be rigorously exacted as a minimum*, and *any* failure on your part to perform in *any* month the *quantity* of work *stipulated for that month* will be considered by me as *sufficient cause* for the exercise of the right reserved to the United States in paragraph 37 of the specifications to the contract to purchase needed materials in the open market; of the discretion given me in paragraph 39 of the specifications to suspend monthly estimates and payments; and the right conferred upon me in paragraph 41 of the specifications, after five days' notice, *to annul the contract and take possession of your plant, and so forth, at a rental valuation to be determined by myself*" (Rec., p. 59).

There is nothing in this language from which it can be claimed that the claimant was advised that the *quantity* stated in the order was a guess, estimate or opinion or that it was in any respect liable to change. On the contrary the claimant was advised that the quantities specified would be "*rigorously exacted as a minimum*," and that "*any* failure" "to perform in *any* month the *quantity* of work stipulated for that month" would be sufficient cause for the imposition of the ruinous penalties stipulated in paragraphs 37, 39, and 41 of the specifications (Rec., pp. 8-9).

Finally, the order concludes with the statement that "the programs are so arranged that any of the contractors can do *more* than the amounts laid down for them . . . but *they can not do less*" (Rec., pp. 59-60).

The court below, in its opinion, has not quoted, nor in any way indicated any words in this order which it considered as showing that the specified quantities were "the

amount of sand which the engineer officer in charge thought *might* be necessary," or that they represented merely that "an additional quantity of sand *might* be needed," or that the provisions of the order as to quantity were "liable to be changed at any time," and it is respectfully submitted that this court will search the order in vain to find any language in it which will support such a construction of its terms or purpose.

It may be admitted that Colonel Leach *could* lawfully have so framed this order as to reserve the right to change the quantify, by either increase or decrease, at any time before delivery. He did reserve the right to change the *locality* of work, but as to *quantity* he was careful to make it absolute and unconditional.

And the fact that the right *is* reserved in the order, to qualify its terms with respect to *one* feature, namely, *location*, while as to *quantity* and *time*, this right is *not* reserved, presents a case in which applies with unusual and peculiar force the maxim, *inclusio unius est exclusio alterius*. The qualification of this *one* element of *place* serves to accentuate the positive character of the other elements, of *time* and *quantity*, which are *not* qualified.

The very purpose of the order shows that it would have been a vain and useless thing, had it been *indefinite* or subject to any change as to *quantity*. As it concerned the *completion* of a *physical* structure, of fixed dimensions, a schedule of *quantities* or *time* which were mere *estimates*, would have served no purpose. The order, in its opening lines, declares its purpose in these words:

> "Having in view the systematic and orderly sequence of the work on the Washington Aqueduct filtration plant *from the present time until its completion*. . . . I have laid down a general program of *work to be done during each of the months from now on*" (Rec., p. 58).

The declared purpose of the order was to inform the claimant of the *exact quantity* of work he was to do and the precise periods of *time* within which the several specifically itemized installments and the aggregate whole were to be done, and he was then pointedly advised that he was—

> *"required to take notice that the* **quantities** . . . *above scheduled* . . . *will be rigorously exacted as a minimum"* (Rec., p. 59).

Had the United States actually required the claimant to furnish the whole 151,000 cubic yards here scheduled, instead of stopping him, as it did, 21,506 cubic yards short of that quantity, could the claimant have been heard to say that the order was a mere estimate and not a positive direction to furnish that specific quantity? Would this court tolerate such a contention? Assuredly not. And if the order could so bind the claimant, upon what principle can the same words be construed as a mere estimate, subject to change, at the instance of the party who issued it?

The court below appears to have based its opinion on this question (Rec., p. 65) upon the decision by this court in Bulkley *vs.* United States, 19 Wall., 37, but it is respectfully submitted that the facts in that case are so entirely different from those in the one now before the court that the decision in that case can have no application.

As clearly pointed out in that case, by Mr. Justice Swayne (p. 38), Bulkley had entered into a contract to transport an unlimited quantity of army supplies to the West in lots of from 100,000 to 10,000,000 pounds, as turned over to him. The quantities, times of transportation, and destination were all indefinite, *depending altogether upon military necessities and emergencies.* In order to facilitate the contractor in arranging for trans-

portation it was agreed that previous notice should be given him, of the quantity and kind of stores, and their destination, the length of notice varying according to the quantity to be transported. But this *notice* did not constitute a contract because the contract specified that even when given it should be "subject to *such changes as shall be decided upon* while *in transitu*." In the opinion, Mr. Justice Swayne says (p. 40):

> "The effect of the notice was to signify a purpose on the part of the Government, and that purpose was liable to change at any time before it was executed. Indeed, *it is expressly stipulated that it might be altered* while the stores were *in transitu*, and there is no limit prescribed as to the extent or character of the changes that might be made. If, the day after the transportation commenced, the wagons had been ordered back to their place of departure, unloaded, and the transportation abandoned, there would have been no breach of the contract. The *change* would have been *within its letter and meaning*."

In this case, there is no stipulation, either express or implied, that there should be any change; on the contrary, as above shown, the order was as absolute and unconditional as language could make it, coupled with the threat of the imposition of ruinous penalties for the slightest failure in full compliance with the order.

The case at bar, it is submitted, is, however, controlled by the decision of this court in Parish *vs.* United States, 100 U. S., 500, in which, as appears by the opinion, the contract was to furnish—

> "the whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863" (pp. 500-1).

Subsequently, the Assistant Surgeon-General sent an order to Parish & Company directing them to deliver

30,000 tons of ice, 5,000 at St. Louis, 5,000 at Cairo, 10,000 at Memphis, and 10,000 at Nashville (p. 502). Mr. Justice Miller, in delivering the opinion of the court said (p. 505):

> "The order of the 25th of March, made within twenty days after the contract was signed, was *an unequivocal demand*, under that instrument, that the amount of 30,000 tons, part of an unlimited quantity which might have been required of the contractor, should be delivered as therein directed. . . . If claimants had failed to have the amount thus demanded ready for use when required, the officers of the government would have procured it at any price in the market, a price which would have been enormously enhanced by this very demand, and the claimants would have been liable for the difference between what the government paid under these circumstances and the price fixed in the agreement. They were therefore under an imperative necessity to prepare to fulfill this requirement."

In this case, as in that, the original contract was for an indefinite quantity; here as there was an absolute order to supply a fixed quantity, in different localities, within a fixed time, coupled with the threat to buy in the open market at claimant's risk, to suspend monthly payments and to annul the contract, seize the claimant's plant and machinery and use it at a rental to be fixed by the Government agent, and complete the contract at claimant's cost.

II.

The Order of February 17, 1905, is Not Only an Absolute and Unconditional Order by its Terms, But Was so Intended at the Time.

It is respectfully submitted that the order of February 17, 1905, which, on its face purports to fix, absolutely and unconditionally, the *quantity* of sand to be supplied,

considered in the light of the surrounding circumstances, established by the findings of fact, was *actually intended*, at the time, by the engineer officer in charge, to fix that quantity; that the terms of the order were not due to any inadvertent use of words, and, that if any error was committed, it was an error of *computation*, by the engineer officer in charge or by his subordinates, or in the *basis* taken for such computation.

The declared object of the order, so stated on its face, was to map out a program of work, by installments, which, if followed, would *complete the job within the time specified*, i. e., by the end of October, 1905.

Such a program would have been worse than useless, and could only have created confusion, if the *figures* as to quantities had been mere estimates. They must have been at least *approximately exact*. Before the work could be divided up into specific quantities per month, reaching completion by the end of October, 1905, the aggregate, to be so divided, must, of necessity, have been first ascertained.

That a computation, to that end, was in fact made, before the order of February 17, 1905, was made, and that the result of that computation was embodied in the order is clearly deducible from the findings.

As established by the findings, when, in October, 1904, it was discovered that the specifications had been changed, so as to eliminate the allowance for shrinkage after settlement with water, as originally made by Mr. Hazen, Mr. Hazen suggested an increase of one inch per foot and one inch additional, for each bed, "and a computation was made on that basis" (Finding V, Rec., p. 57).

What that computation was, the court refused to find as a fact, as shown by the opinion, in which it says (Rec., p. 66):

> "Plaintiff's counsel thinks that this finding is material as an essential part of the *res gestae*

> to explain subsequent acts and declarations of the contractor, because he says that if a computation was made at all there is *necessarily established the further fact that some amount in figures was reached.* . . . Accordingly, the court *excludes* the attempt to prove plaintiff's suppositions and thoughts about the matter as incompetent testimony."

But though the court did refuse to make any finding as to what that computation was, it did find, that some time prior to January 3, 1905—

> "Hardy *made computations upon the basis of said Hazen's recommendations*, and he and Lieut.-Col. Leach, *the engineer officer in charge, estimated the approximate aggregate quantity* of sand to be required" (Finding VII, Rec., p. 57).

On the third of January, 1905, over one month *before* the order of February 17, 1905, Colonel Leach wrote the claimant, directing him what quantity of sand to put in the fifteen of the twenty-nine beds then ready to receive sand, requiring him to place in those beds 70,000 cubic yards of sand, in addition to 20,936 cubic yards already in place, "making the total requirement for said 15 beds 90,936 cubic yards" (Finding VII, Rec., p. 57).

This, it will be observed, was an average of a trifle *more* than 6,062 cubic yards per bed. In the order of February 17, 1905, he requires, in all, including that then in place, 179,231 cubic yards (Finding VIII, Rec., p. 60), which would be a trifle over 6,180 cubic yards per bed. In the order, after giving the schedule of amounts, and months for the different beds, he says:

> "In the program outlined above the quantity of sand going into each bed has been assumed as 6,000 cubic yards. The depth of sand *varies* for the different beds, but 6,000 yards is about the average" (Finding VIII, Rec., p. 59).

An average of 6,000 cubic yards per bed for the twenty-nine beds would have amounted to 174,000 cubic yards. But while the order states that "6,000 yards is *about* the average" (Rec., p. 59) it does not confine itself to "averages," but gives a schedule of *exact* figures for the different beds, in groups, after taking note of the sand *already in place*, as shown by the finding (Finding VIII, Rec., p. 60), and provides for the aggregate amount of "179,231 cubic yards" (Finding VIII, Rec., p. 60).

It is respectfully submitted that these figures, expressing the amount down to a single yard—179,231 cubic yards—as fixed by the finding, of themselves demonstrate the intent to express the *exact quantity*, and not an *estimate*, and could never have been arrived at except by some computation, made for the very purpose of specifying the exact quantity.

When, on April 18, 1905, he received Mr. Hazen's report, fixing the quantity at over 21,000 *cubic yards less*, and immediately approved and adopted that report, it is obvious that he merely adopted Mr. Hazen's *figures*, in place of his own, and that but for Hazen's report, he would have required the order of February 17, 1905, to be executed according to its terms, and would have accepted the entire quantity of 179,231 cubic yards, as stated in the order.

It seems, therefore, to be undeniable, that this order is not only in *form* an order for the fixed and absolute quantity of 179,231 cubic yards of sand, but that it was so intended to be at the time it was made.

III.

Lieut.-Col. Smith S. Leach, the Engineer Officer in Charge, Had Lawful Authority to Make the Order of February 17, 1905.

It was argued in the court below that even if the order of February 17, 1905, could be construed to be an absolute and unconditional order requiring an aggregate of 179,231 cubic yards of sand, it was void *ab initio*, as, under the contract and specifications, Colonel Leach could not make such an order without the approval of the Secretary of War.

The court below abstained from deciding this question saying (Rec., p. 64):

> "The court does not deem it essential to the determination of the issue on the item respecting the claim for profits on account of the *increase* of sand to enter into the question of the necessity of an approval by the higher officers of the Government of the alleged order."

Nevertheless the court intimates that such approval was necessary, because in the succeeding paragraph it says (Rec., p. 64):

> "If there was any *increase outside of the original contract* and a new tentative arrangement was made between plaintiff and subordinate officers who were not authorized to *change the agreement*, the approval of higher and superior officers became necessary before *any arrangement for an increase outside* of the original contract became valid."

It must be borne in mind, however, in connection with these observations of the court below, that the order of February 17, 1905, though requiring the supply of 179,231 cubic yards, in the aggregate, as against the 140,200 cubic yards, stated in the original contract, does not

in law or in fact increase the quantity outside of the original contract, and could not possibly do so, for the very conclusive reason that the *original* contract and accompanying specifications *do not determine the question of quantity.* In the original contract and specifications, the matter of *quantity* is purposely left so uncertain and indefinite, that no order reducing this indefiniteness to certainty could, by any possibility, operate either to *increase* or *diminish* the quantity outside the contract. The contract merely suggesting a certain quantity—140,200 cubic yards, *more or less*—gives no basis for comparison, of which either increase or decrease can be predicated. Had the contract stipulated for 140,200 cubic yards, *absolutely*, this would have been a fixed quantity and no more could have been demanded and none less accepted.

In such a case, an order requiring 179,231 cubic yards instead of 140,200 cubic yards, would, obviously, have been an increase, outside the original contract. But the contract and specifications here involved do not do this. They are drawn with the special object of avoiding a definite and fixed quantity.

The contract provides for 140,200 cubic yards, "*more or less*" (Rec., p. 48) and the specifications, which form a part of it, provide in paragraph 20, that—

> "it is understood and agreed that the *quantities* given are *approximate only*, and that no claim shall be made against the United States on account of any *excess* or *deficiency, absolutely or relative,* in the same (Rec., p. 6).

So, also, in the form of proposal which the bidder was required to submit, he was required, with reference to *quantities*, to use the form of expression "*all quantities specified being more or less*" (Rec., p. 42).

It was decided by this court, in a very full discussion by Mr. Justice Bradley, in the case of Brawley *vs.* United

States, 96 U. S., 168, 172, that if a suggested quantity, "more or less," is—

> "supplemented by other stipulations and conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract *is not governed by the quantity named nor by that quantity with slight and unimportant variations*, but by what the receiving party shall require for the use of his mill."

But while the contract was wholly *uncertain* as to the quantity to be required it did not lack the means of being *rendered* certain, and when so reduced to certainty, whether that certainty fell below or rose above 140,200 cubic yards it did not either decrease or increase the quantity, outside the contract, but merely made the quantity, which was before indefinite, definite and certain.

It is also important to be observed that the contract was equally indefinite as to the *amount of money* the contractor was to receive. This was not a contract under which the contractor was to receive a certain fixed sum. The stipulation for payment is that he shall be paid" (Rec., p. 48):

> "Two dollars and sixty-five cents ($2.65) *per cubic yard* for filter sand for all . . . sand so delivered and accepted."

It was an inherent necessity, apparent on the face of the contract itself, therefore that at some time, and in some way, this indefiniteness as to *quantity* should be reduced to certainty, else performance would be impossible. Provision was made, in the specifications, for the reduction to certainty of this indefiniteness as to quantity, and

authority to say *how much* "more," or *how much* "less," than the suggested quantity of 140,200 cubic yards of sand should be required, was specifically conferred upon the "engineer officer in charge," whose decision thereon is made final. Paragraph 29 of the specifications sets forth this authority, and is the only provision in the contract by which the quantities can be fixed. It is in these words (Rec., p. 7):

> "The decision of the engineer officer in charge as to quality and *quantity* shall be *final.*"

So also, paragraph 2, of the contract, repeats this authority. It is as follows (Rec., p. 48):

> "All materials furnished and work done under this contract shall, before being accepted, be subject to rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. *The decision of the engineer officer in charge as to quality and quantity shall be final.*"

The most minute examination of the entire contract and accompanying specifications will show that there was no other person or officer authorized to give the contractor any instructions or information as to the *quantity* to be supplied, except the engineer officer in charge, whose decision, as above shown, was made final.

Not only did the contract and specifications give to the engineer officer in charge the authority to fix *quantities*, where they were not definitely fixed by the contract or specifications, but the United States, in this very case, recognized the exercise of that authority by the engineer officer in charge.

As shown by the findings of fact (Eighth finding, Rec., p. 60; Eleventh finding, Rec., p. 61), the claimant furnished and the United States *accepted and paid for*

157,725 cubic yards of sand, or 17,525 cubic yards *more* than the 140,200 cubic yards mentioned in the contract and specification. The *sole* authority for furnishing this increase of 17,525 cubic yards, which, at the contract price of $2.65 per cubic yard, cost over *thirty-six thousand dollars*, was, as shown by the Eighth finding (Rec., pp. 58-60), this order of February 17, 1905.

If it was sufficiently binding to require the claimant to furnish and the United States to accept and pay for 17,525 cubic yards in excess of the 140,200 cubic yards mentioned in the contract and specifications, it would seem to be equally binding as to the entire quantity embraced by the order.

The only reason suggested, in behalf of the United States, so far as known to counsel for the claimant, why this order of February 17, 1905, by the engineer officer in charge required for its validity the approval of the Secretary of War, is the provisions of paragraph 6 of the contract. A careful analysis of this paragraph, in connection with paragraph 296 of the specifications, will show that it does not restrain or affect the general power given the engineer officer in charge to fix the *quantity* of any material to be supplied, which quantity was not already definitely fixed by the contract or specifications.

For convenience in comparing and harmonizing these two provisions of the specifications and contract, the material portions of each are here placed in juxtaposition, thus:

Par. 296. Specifications (Rec., p. 41).—"If an emergency demands, or if the *engineer officer in charge* deems it desirable, *he* shall have and is hereby given the *right and power to to make any alterations or changes* in the line, grade,

Par. 6. *Contract* (Rec., p. 49).—"If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the *project*, and this change or modification should involve such change

plan, form position, dimensions, details, quality or materials of the work herein contemplated, or any part thereof, either before or after the commencement of construction, but in case of such changes and alterations, the same *shall be ordered in writing by the engineer officer in charge.*"

in the *specifications* as to *character and* quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus *substituted* for those named in the original contract, and *before taking effect must be signed by the Secretary of War.*"

It is perfectly clear that these two provisions are entirely consistent. Any change in the "*project*" which involves a "*change* in the specifications," not in quantity *only* but in "*character and* quantity," that is which involves not mere increase of something specified, but something else "*substituted*" for that "*named in the original contract,*" must be reduced to writing and be "signed by the Secretary of War." All other changes and alterations, not involving such a change "in the *project*" the engineer officer in charge is given by paragraph 296 of the specifications "*the right and power to make*" and "the same shall be *ordered in writing by the engineer officer in charge.*"

Upon what theory can it be claimed that the order of February 17, 1905, is within the provisions of paragraph 6 of the contract requiring for its validity the signature of the Secretary of War? It makes no "*change*" whatever in the "*project.*" The "project" remains as originally defined in the contract, plans, and specifications;

it makes no "*change*" in the "*specifications,*" for it has not "*substituted*" anything in the stead of anything "*named in the original contract;*" but relates to the same filter sand therein described. It does not even "change" the *quantity* provided by the specification, for the specifications are *indefinite* as to quantity the quantity was stated as 140,200 cubic yards, "*more or less,*" and paragraph 20 of the specifications expressly stipulates that "the *quantities* given are *approximate only*" (Rec., p. 6), and to meet this situation paragraph 29 of the specifications provided that the "decision" of the engineer officer in charge as to "quantity shall be final" (Rec., p. 7).

Will any one, even counsel for defendant in the stress of dire necessity, claim that an order definitely fixing the quantity, either below or above 140,200 cubic yards "*changes*" the "*project*" or the "*specifications?*" The logic and the truth are that this order "*changes*" nothing; it merely renders certain and definite what was intentionally left uncertain and indefinite, to be later fixed by the engineer officer in charge.

It was suggested in the court below that under paragraph 6 of the contract this order would require for its validity the signature of the Secretary of War because it would have the effect of increasing the cost. But even "*changes*" which merely increased the *cost* without changing the "*project*" did not require the signature of the Secretary of War. Paragraph 296 of the specifications gave the engineer officer in charge the "right and power" to make "*changes,*" requiring only that "the same shall be ordered in writing by the engineer officer in charge" (Rec., p. 41). And the same paragraph provides that if the effect of such order is to *increase* the amount of work, it shall be paid for "at the price established for such work under the contract" (Rec., p. 41); so that the engineer officer in charge is expressly au-

thorized to make "changes," *increasing* the cost, without the intervention of the Secretary of War, but solely on his own order in writing.

When, in addition to this, it is seen, as already demonstrated, that the order of February 17, 1905, makes no *change* in *anything*, but merely makes *certain* what was purposely left *uncertain* in the contract and specifications, both as to *quantity* and *cost*, and is made by the only person or officer who was authorized to reduce those matters to certainty, the claimed necessity for the approval of the Secretary of War is at once shown to be without foundation.

Indeed, to sustain such a contention would defeat one of the prominent purposes of the contract, which was to *relieve* the Secretary of War from the duty and responsibility of supervising the work and determining the technical questions of physical quantity and construction, which must inevitably arise in the building of a structure of this magnitude and intricate character, and to impose that duty, responsibility and authority upon a *trained* and competent *expert*, an engineer officer of the army. Otherwise, all questions of quantity, which had purposely been left *undetermined*, and to be decided in the progress of the work, would have required to be referred to and decided by the Secretary of War, a consequence which the contract and specifications were plainly framed to prevent.

A similar contention was made in the case of Parish *vs.* United States, 100 U. S., 500. In that case, as already pointed out in this brief, as here, a contract for supplying an *indefinite* quantity of ice was made with Parish & Company. An Assistant-Surgeon gave an order, as in this case, for supplying a specific number of tons at specific places. Afterwards this order was revoked by the Surgeon-General as being without authority and this contention was sustained by the Court of Claims.

This court, however, through Mr. Justice Miller, rejected that view of the matter, saying (p. 504):

> "The opinion of the Court of Claims found in the record bases the dismissal of the petition on the ground that the Assistant Surgeon-General, in making the order on claimants for the 30,000 tons of ice, was acting so wholly without authority, that Parish & Co. had no right to treat it as of any validity or as one which they were bound to regard. In the argument of the case before us, the counsel for Government abandons this view of the matter, and, we think, very properly. We apprehend *if the case were reversed, and the United States were suing for damages incurred by a refusal of the contractors to conform to this order, the amount specified being needed and not forthcoming, there would be no question of the validity of the notice of the Assistant Surgeon-General.*"

Had the claimant here refused to obey the order of the engineer officer in charge, and the latter, in pursuance of his threat, had annulled the contract, taken possession of the claimant's plant, tools, machinery, and so forth and completed the contract, or purchased, in the open market the sand specified in the order, over and above the 140,200 cubic yards mentioned in the contract, could the claimant have resisted on the ground that the Secretary of War had not approved the order?

IV.

The United States is Liable to Claimant for the Anticipated Profits on the Sand He Was Not Permitted to Deliver.

Of course, if the order of February 17, 1905, was not an absolute order to supply the gross quantity of sand therein specified, or if the engineer officer in charge had no lawful authority to make the order, the claimant has no case. Assuming, however, as it is respectfully sub-

mitted has been demonstrated, that the order is absolute and unconditional on its face and contains no reserved right of modification as to quantity, and that the officer making it had the lawful authority so to do, the consequence would seem to be indisputable, that a refusal to take the whole quantity ordered would render the United States liable for the profits which would have accrued to claimant had he been permitted to furnish the entire quantity so ordered.

The findings show that when the claimant was advised he would not be permitted to supply the whole quantity ordered—

> "he *immediately entered a protest to the engineer officer in charge* against what he claimed was a reduction in the quantity of sand and *insisted upon his right* to supply the whole quantity, ordered in said letter of February 17, 1905, and he *tendered himself ready and willing to furnish same.* Said protest was disregarded by the engineer officer in charge and claimant was only permitted to supply 157,725 cubic yards. Claimant had an *abundant supply* of sand of the kind required, and *ample facilities* for delivering in place within the time prescribed by the order of February 17, 1905, the *entire quantity* required by said order" (Finding XI, Rec., p. 61).

It is also shown by the findings that there is nothing conjectural or uncertain about these anticipated profits, the court below being able to compute and find them, to the exactness of a cent, and finding that they would have been $28,065.33 or $29,420.20, according to whether the cost of the new plant be included or excluded in their production (See Finding XII, Rec., pp. 61-2).

The findings establish, therefore, that there was no *waiver* on the part of claimant, that he protested against the refusal to receive the sand, tendered himself ready to supply it, that he was amply able to do so, and that

the profits were certain and readily susceptible of determination.

The law applicable to these facts in so far as it relates to the measure of damages is settled by the decisions of the Court of Claims and of this court.

In the case of Behan *vs.* United States, 18 Ct. Cl., 687, that court, speaking through Mr. Justice Richardson said (p. 699):

> "Whatever rule may be adopted in calculating the damages to a contractor when, without his fault, the other party, during its progress, puts an end to the contract before completion, the *object is to indemnify him for his losses sustained and his gains prevented* by the action of the party in fault, viewing these elements with relation to each other."

In reviewing this case, on appeal, this court in United States *vs.* Behan, 110 U. S., 338, through Mr. Justice Bradley quotes, with approval (p. 343) the opinion of the Court of Claims and says (p. 344):

> "The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of *two distinct items or grounds of damage*, namely: first, *what he has already expended towards performance* (less the value of materials on hand), secondly, *the profits that he would realize by performing the whole contract.* The second item, profits, can not always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of Masterson *vs.* Mayor of Brooklyn, 7 Hill, 69, they are '*the direct and immediate*

> *fruits of the contract,'* they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation.' "

That the profits on the sand were the essential object of the contract in this case and the sole inducement to the claimant to enter into it admits of no question, that they were the direct and immediate consequence of performance of the contract is equally clear and certain.

Unless some stipulation can be found in the contract which would exempt the defendant from liability for this element of damage, the case is clearly one to which the foregoing rule applies.

A careful examination of this contract will show that it contains no language exempting the defendant from liability to this rule of damages or disclosing any purpose to limit, in any way, its liability to the ordinary legal consequences from such a breach of the contract as is complained of in this proceeding. The only provision in any way touching upon this subject is contained in paragraph 296 of the Specifications, which is as follows:

> *Alterations.*—If an emergency demands, *or if the engineer officer in charge deems it desirable,* he shall have and is hereby given the right and power to make any alterations or changes in the line, grade, plan, form, position, dimensions, details, quality, or materials of the work herein contemplated, or any part thereof, *either before or after the commencement of construction,* but in case of such changes and alterations, the same shall be ordered in writing by the engineer officer in charge. If such alterations or any other cause diminish the quantity of work to be done *from that exhibited at the time of letting,* or if any of the items shall be omitted, *reasonable written notice*

> *having been given*, they shall not constitute a claim, and no claim for damages or for anticipated profits on the work that may be dispensed with shall be made by any contractor" (Rec., p. 41).

This provision, confined by its terms to alterations in the work varying it "from that exhibited *at the time of letting*," can have no application to changes of a *subsequent* order varying the quantity fixed by such *subsequent* order. It is not claimed here that there was any diminution of the work as exhibited "at the time of letting;" on the contrary, the work actually done was 17,525 yards *more* than that exhibited at the time of letting. The claim here is founded upon the fact that, *after* the time of letting, the amount of work indicated by the original contract was increased by nearly 40,000 yards, and after the performance of this modified contract was entered upon, by claimant, this *increase* of nearly 40,000 yards was *decreased* by more than 21,000 yards. Nor was any "*reasonable written notice*" as provided in paragraph 296, or any notice of the change given. The claimant was *compelled* to proceed with the new schedule from February 17, 1905, to May 29, 1905, a period of *three and a half months* of the eight months allowed for the whole work, without *any* notice of any intended change. From April 18, 1905, to May 29, 1905, a period of *six weeks after* the change *had actually been made* he was still *compelled* to proceed under the order *without any notice whatever* of the fact of such change. At no time was *written* notice given of any change, the finding on this subject of notice being:

> "Claimant was *not notified* of the terms of said report as to the aggregate quantity of sand to be supplied until May 29, 1905, when he was *orally* informed by Col. Leach" (Finding XI, Rec., p. 61).

So that if this paragraph 296 of the specifications could have any application at all to the order of February 17, 1905, it would serve rather to *create* a liability than to exclude it because of the failure to give "reasonable written notice" or any notice, of the proposed change, during which time the claimant, in entire ignorance of the proposed change, had expended over $12,000 in the erection of a new plant for the purpose of furnishing the increased supply of sand required by the order of February 17, 1905.

As the exemption from liability for anticipated profits, sought to be created by paragraph 296 of the specifications, to whatever changes it may be held to apply, is an exemption founded upon the *condition precedent* of "reasonable *written* notice having been given," no exemption from liability for anticipated profits could arise by virtue of that paragraph, because no notice was given, and the general rule, as laid down in Behan's case, *supra*, applies.

V.

Claimant is Entitled to Recover for the Cost of the New Washing and Screening Plant.

The basis of the claimant's right to a judgment against the United States for the cost of the new washing and screening plant is that it was an outlay rendered necessary in order to supply the increased quantity of sand required by the order of February 17, 1905. Here, as well as with reference to the other claim, for anticipated profits, it is conceded that, unless the order of February 17, 1905, was a valid, absolute and unconditional order to supply, in the aggregate, the quantity of sand therein specified, this claim was properly disallowed. All that is here urged, therefore, rests upon the assumption that

claimant's contention as to the proper construction of that order is sustained by this court.

It is established by the findings that—

> "the erection of the additional plant was commenced on February 24, 1905, and finished May 30, 1905. The additional plant was not used for furnishing the sand *specified in the contract nor for any part of that which was in fact furnished by claimant*" (Finding IX, Rec., p. 60).

It is further established by the findings that—

> "after deducting the value of all materials sold or on hand and fit for use the net cost of the plant to claimant amounts to $9,888.04, which amount became a loss to claimant" (Finding X, Rec., p. 61).

It is also established by the findings that the claimant furnished all of the 140,200 cubic yards of sand specified in the original contract, and all that the Government would allow him to furnish in pursuance of the order of February 17, 1905, to wit, 17,525 cubic yards, additional, in all 157,725 cubic yards within the specified time, namely, the month of October (Finding VIII, Rec., p. 60).

Notwithstanding the fact that the erection of the new plant was not *commenced* until February 24, 1905, *seven days after* the order of February 17, 1905, and was not *finished* until May 30, 1905, *more than three months after that order*, and notwithstanding the fact that it was not required to be used and was not in fact used, either to supply any part of the 140,200 cubic yards of sand mentioned in the original contract and specifications nor of the 17,525 cubic yards additional required by this order of February 17, 1905, the court below, in its opinion, holds that this additional plant was not built *solely* for the purpose of taking care of the deliveries of

the additional quantities of sand set out in the order of February 17, 1905, but that it was one of the proper and necessary expenses of the discharge of the original contract for the 140,200 cubic yards of sand (Rec., p. 63).

This conclusion appears to be based upon certain erroneous *conclusions of law*, commingled with the findings of fact, as deductions from the facts actually found.

As early as October, 1904, the claimant was apprised of the error in the specifications, and the probable necessity for an increase in the quantity of sand in consequence thereof (Finding V, Rec., pp. 56-7). The court finds that in the "fall of 1904" (but at what date or in what month it does not find) the claimant *contemplated* and began to make preparations and plans for an additional plant, that as early as the fall of 1904 the Government engineers complained of delay and that claimant said he expected and in fact promised to build an additional plant (Finding IX, Rec., p. 60), and that on January 5, 1905, he wrote that he had already taken steps to build an additional plant (Finding VI, Rec., pp. 57-8). But all of these statements of the claimant, *as the findings show*, were made *after* claimant had been advised of the *probable increase in the quantity of sand*, although the court, as shown in its opinion (Rec., p. 66), *refused to find the facts*, either way, as to the circumstances under which these statements were made.

Nevertheless, the findings do show, that notwithstanding these discussions about the new plant, the claimant *did not in fact commence* the construction of the new plant until he had a binding written authority to furnish this much talked of extra quantity of sand; namely, until seven days after the order of February 17, 1905.

In fact, the findings show that while the Government agents *talked* of an increased supply of sand but did not *act* the claimant also *talked* of the new plant, but did not

act about it. When, finally, the engineer officer in charge did *act* and on February 17, 1905, *in writing* ordered the increased quantity of sand, the claimant also *acted* and seven days later began the construction of the additional plant.

That the court below entirely misconceived the claimant's purposes and the true effect of the order of February 17, 1905, and its true relation to the construction of a new plant, is matter of demonstration by comparison of the court's findings of fact with the following language in the opinion (Rec., p. 63):

> "It is apparent that *at the time the additional plant was erected* the situation relating to deliveries of sand was so uncertain that the engineer officer in charge gave formal notice to the contractor by the letter of February 17, 1905, that the contract would be forfeited or penalties imposed *if deliveries were not made* more promptly."

In the first place the letter of February 17, 1905, was not written "at the time the additional plant was erected" The additional plant was neither "erected" nor its construction even *commenced "at the time"* that letter was written. By the court's own findings of fact, it is established that—

> "the erection of the new plant was *commenced* on February *24*, 1905, and *finished May 30*, 1905" (Finding IX, Rec., p. 60).

And by the same finding it is further established that *a month before the additional plant was erected*, that is, at the end of April—

> "it was not found necessary to run the plant night and day, as the claimant had caught up with the other contractors on his deliveries and there were **no more beds in readiness to receive the sand"** (Finding IX, Rec., p. 60).

The court below is equally in error, on the facts found by it, in concluding that by the letter of February 17, 1905, the engineer officer in charge "gave formal notice" "that the contract would be forfeited or penalties imposed *if deliveries were not more promptly made.*"

The whole of this letter is set out in Finding VIII (Rec., pp. 58-60), and a minute examination of its every word will show that it contains *no complaint of insufficient deliveries*, and that the threat of forfeiture of the contract, or of imposition of penalties is solely with reference to supplying the *specific quantities* of sand during the *enumerated months, as ordered by that letter*, which is the *first* time, in the history of the work, as shown by the findings, *that any schedule of quantities, in stated times, was ever ordered by anyone.*

The apparent suggestion in the opinion that the claimant, by his default, was delaying the completion of the work and thus gave rise to this letter is negatived by the court's own findings. The contract was made with claimant on *"April fourth, nineteen hundred and three"* (Rec., p. 47, Finding I, Rec., p. 55), and, although the provision of the act of Congress set out in paragraph 42 of the specifications (Rec., p. 9), and paragraph 298 of the specifications (Rec., p. 41) required the completion of *all the work on the entire filtration plant* by December 1, 1904, and although as shown by the findings—

> "said filter sand was to be deposited in 29 beds, and the *defendants* [the United States] agreed to cause to be done all necessary work, *to construct said beds in condition ready to receive said filter sand*" (Finding II, Rec., p. 56);

yet, as further shown by the findings, it was not until *one year and four months later* that claimant was allowed to *begin* the delivery of *any* sand.

> "On July 15, 1904, claimant was notified by Lieut.-Col. Miller that he *would be prepared* to

receive gravel and sand in place on *August 1, 1904*, and requested him to make arrangements *to begin delivery by that date*" (Finding III, Rec., p. 56).

The court's findings further show that on November 30, 1904, the day before the entire work should be completed, the engineer officer in charge notified claimant that the time limit would be waived for a reasonable time (Finding VI, Rec., p. 57). This notice does not purport to be founded upon any default on the part of claimant, and the ensuing finding of fact shows that the United States, itself, was in default, because, although the time of completion of the *entire* work, as originally provided had expired, only about *half* the beds were *then ready to receive sand.*

> "By the 3d of January, 1905, 15 of the 29 beds were completed ready to receive sand" (Finding VII, Rec., p. 57).

When, to this, is added the further fact, found by the court in its findings, that at the end of April, 1905, the claimant was compelled to stop running his sand plant during the night, because he had "caught up with the other contractors" and "*there were not sufficient beds in readiness to receive the sand*" (Finding IX, Rec., p. 60), it becomes apparent that the smaller quantities of delivery, by the claimant, in the earlier stages of the work, did not, in anywise, jeopard the completion of the work nor operate to embarrass the Government or the other contractors in the performance of their work, which, obviously, had to be *completed before* claimant could do his part.

When, in the light of these facts, found by the court, the letter of February 17, 1905 is examined, it will be found not to be a reprimand of the claimant, but to have

an entirely different purpose, which is stated in the opening paragraph, to wit:

> "Having in view the systematic and orderly *sequence* of work . . . and for the purpose of so regulating its progress as to *enable* each of the contractors engaged on the work to prosecute his particular part to the best advantage and with the greatest energy, with a *minimum of interference* by the presence or operations on his ground of *other* contractors, I have laid down a general program of work," etc. (Finding VIII, Rec., p. 58).

There then follows this program, showing the quantities and dates of sand deliveries to be maintained by the claimant from then to October, and *not one word of reprimand or complaint*, which, in view of the incomplete state of the work necessarily precedent to the claimant's, as shown by the findings, would not have been justified, had it been made.

Looking now to the threat of forfeiture and imposition of penalties, it will be seen that this threat relates, exclusively, to the maintenance of the schedule of quantities and time, *then for the first time, laid down.* The language is:

> "You are required to take notice that the quantities of work . . . *above scheduled* for the several months will be rigorously exacted as a minimum and any failure on your part to perform in *any month* the quantity of work *stipulated for that month* will be considered by me as sufficient cause for the exercise by me of the right reserved by the United States," etc., etc. (Finding VIII, Rec., p. 59).

It is perfectly plain, therefore, that this caution had no reference to *past* transactions. It looked solely to the *future* and did not even complain of the past. The engineer officer in charge had then ascertained, as he

supposed, the aggregate quantity of work to be done; he divided it up, or parceled it out, in months; and he imposed this rigid rule of compliance to avoid just what happened to the claimant, namely, his overtaking another contractor doing antecedent work, and then being compelled to diminish his output by just one-half, because, by reason of the operations of other contractors, "there were not sufficient beds in readiness to receive the sand" (Rec., p. 60).

VI.

The Record Contains No Finding of Fact Supporting the Conclusion of Law Disallowing the Cost of the New Plant.

The disallowance of this item of $9,888.04, the net loss from the construction of the new plant is based upon the theory that the new plant was a necessary adjunct to the production of the 140,200 cubic yards called for by the original contract and that it was not, therefore, constructed to provide for the increased quantity required by the order of February 17, 1905.

The only supposed findings of *fact* upon which this conclusion of law is based, will be found upon examination, not to be findings of fact, at all, but erroneous conclusion of law, commingled with the findings of fact and inconsistent with and repugnant to the facts found.

These supposed findings of fact are as follows:

> "The claimant had been *far behind in his work*, and as early as the fall of 1904 the Government engineers had been *complaining of his insufficient deliveries* (Finding IX, Rec., p. 60).
>
> "The duplicate plant was erected to provide for such *increased deliveries per month* as were necessary under *claimant's* contract" (Finding IX, Rec., p. 61).

Counsel will undertake to demonstrate that the foregoing propositions are mere conclusions or inferences *in direct conflict* with the actual *facts* found by the court.

Before the claimant can be said to have "been far behind in his work" the findings must show that he had failed to supply what was required of him under the contract.

The contract does not specify any given quantity to be supplied at any given time, but it does furnish a *test* by which the sufficiency, in quantity, of his work may be determined. That test is contained in paragraph 297 of the specifications which provides as follows (Rec., p. 41):

> "The contractor for the whole or for each class of work shall commence work on the ground, or delivery of materials, *within thirty days after being notified to that effect* by the engineer officer in charge, and *thereafter* shall prosecute the work, or make delivery, with all due diligence and *at such reasonable rates as may be required by the engineer officer in charge*, and as to whether the rate of progress is satisfactory the engineer officer in charge shall be the *sole* judge."

Two things are here provided, first that the claimant shall *commence* delivery within *thirty* days after being notified to do so, and second, that the subsequent rate of delivery shall be such reasonable rate *as may be required by the engineer officer in charge.*

As to *commencing* the work, the court's finding of facts show that the *Government*, and not the claimant, was at fault.

> "On *July 15*, 1904, claimant was notified in writing by Lieut.-Col. Miller that he would be prepared to receive gravel and sand in place on *August 1*, 1904, and requested him to make arrangements to begin delivery *by that date*" (Finding III, Rec., p. 56).

So, instead of giving the claimant the *thirty* days' notice required by the specification, he only gave him *half that time.* Nevertheless, the same finding shows that the claimant complied with the notice and began the delivery as requested (Rec., p. 56).

As to *rate* of delivery. It is to be ovserved that what is a proper rate of delivery is *not a question for the court to determine either as matter of law or of fact.* By the express terms of the contract and specification, as already pointed out, that is to be "such reasonable rates as *may be required by the engineer officer in charge.*" Before the claimant can be said to be "far behind in his work" it must appear that the engineer officer in charge *had "required"* some "reasonable rate," and that that requirement was not observed. *According to the findings he made no such requirement.* As, therefore, the engineer officer in charge saw fit, as he lawfully might, to refrain from requiring any specific rate of delivery, especially in the initial stages, when he was getting his own bearings for the orderly prosecution of the work, it is not competent for the court to find, as a conclusion of law from the *deliveries themselves,* that they were insufficient, and that the claimant was "far behind." Had the engineer officer in charge, who, by the specifications was made supreme in this matter, undertaken to treat the claimant as in default without first having required some "reasonable rate," his act would have been unlawful. If he required a delivery of one hundred or one thousand yards per day, the claimant would have been bound to comply. As the engineer officer in charge made *no requirement,* the claimant was left to his own judgment and skill until such a requirement was made.

The findings of the court, as to the *real facts* further established that, not only was there no standard of delivery prescribed "as early as the fall of 1904," but

that the first attempt to establish any rate of delivery was on *January 3, 1905.* On that date, the engineer officer in charge, Colonel Leach—

> "wrote to claimant directing him to complete the deliveries of sand in said 15 beds by *May 15*, by placing in the same 70,000 cubic yards of sand" (Finding VIII., Rec., p. 57).

Now what do the findings of fact show with respect to this order? Was it complied with? At the end of April, *fifteen days before* the expiration of the time fixed by this direction of the engineer officer in charge—

> "the claimant had *caught up with the other contractors* on his deliveries, and there were *not sufficient beds in readiness to receive the sand*" (Finding IX, Rec., p. 60).

The findings further show that nothwitstanding the direction of January 3, 1905, requiring this rate of delivery, the claimant did not start the erection of the new plant, but waited until February 24, 1905, seven days after the order of February 17, 1905, to commence the erection of that structure, by which order he, for the first time, received a binding order for 39,031 cubic yards of sand *in excess* of that stipulated in the original contract. And that plant was not finished as shown by the findings, until May 30, 1905 (Rec., p. 60), thirty days *after* the claimant had, by the use of the old plant alone, caught up with other contractors and been compelled to stop working at night, because there were no beds in readiness to receive the sand.

It is respectfully submitted that, from the facts found by the court, there is no foundation for the con-

clusion of law, introduced therein, that the claimant was in default and incapable of discharging the requirements of the *original* contract with the old plant and that the new one was built to do *that* work and not to meet the added requirements of nearly 40,000 cubic yards required by the order of February 17, 1905.

It is respectfully submitted that the judgment appealed from should be reversed and the cause remanded with instructions to enter judgment for the claimant both for the anticipated profits and the cost of the new plant.

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